Code) did not apply to the Supreme Court. I should have thought myself that 'any Court' means what it says, and must necessarily include the Supreme Court. The decision also appears to me to be entirely inconsistent with the objects of the 1918 Code in introducing rules for issue of summons and service out of the jurisdiction, which were conspicuously absent in the 1902 Code. The decision has, however, been acted upon for many years, and I accept it out of respect rather than from conviction.

I presume also that the legislature had the decision in mind when it was declared by the 1933 amendment to the Civil Procedure Code (now section 3) that section 65 did not apply to the Supreme Court. As I have said, sections 65 and 67 provide for the procedure on an application for leave to issue the summons. If no leave is required, it follows that an indication of the procedure for obtaining such leave is superfluous. It is all the more remarkable, therefore, that sections 64 and 67 are not mentioned in section 3, and accordingly must still be deemed to apply to the Supreme Court, although there is no possible occasion on which such procedure could be invoked.

Apart, however, from the question of the issue of the summons it is abundantly clear that leave is required for service out of the jurisdiction. Section 66(i) says so in so many words. It is true that owing to the faulty wording introducing section 67 no procedure is laid down, but this is merely an inconvenience, and cannot affect the express provisions of section 66(i). Such leave is normally granted by an order made in pursuance of an application, and there is nothing in the Code to suggest that an order is not necessary. On the contrary, section 66(ii) states what directions the order is to contain, and section 68, which provides that no order shall be made for service out of the jurisdiction in cases of summary procedure, makes it quite clear that an order is contemplated. In the case decided by Sproule J. orders were obtained from the Registrar giving leave to serve the defendants in Bangkok and in India, and this has always been the rule in England, where applications for leave to issue the writ and serve it out of the jurisdiction are generally made at one and the same time — see *Yearly Practice,* 1936, p. 99, notes to Order 11, rule 4.

In the present case the plaintiff, relying on the authority of the case cited above, issued his summons giving the address of the defendant in India. He then wrote to the Registrar asking for the summons to be served, presumably in accordance with the provisions of section 86, and the Registrar proceeded to serve it. Section 86, however, which was introduced by an amendment in 1933, does not extend the jurisdiction to serve, which is limited by section 66. It merely provides the manner in which service may be effected upon a defendant residing in India or Ceylon, when once leave to serve out of the jurisdiction has been given.

My conclusion is, therefore, that quite apart from the question of the issue of the summons, the plaintiff has been at fault in not obtaining an order for service out of the jurisdiction.

The proceedings since the issue of the summons are accordingly a nullity, and the application for judgment in default of appearance must be refused.

TAN HOE SENG v. PUBLIC PROSECUTOR

[A. Cr. J. (Aitken J.) July 3, 1936]
[Perak Magistrate's Criminal Appeal No. 34 of 1936]

Minor Offences Enactment (Cap. 46), s.35(i) — Possession of property stolen or fraudulently obtained — Reasonable suspicion by the police — Application of s.113 of the Criminal Procedure Code (Cap. 6).

A police officer acting under section 35(i) of the Minor Offences Enactment, (Cap. 46), must have reasonable suspicion at the time he so acts that the property in possession of the accused has been stolen or fraudulently obtained.

[273] Any explanation given by the accused to the police can be used in evidence against him because the provisions of section 113 of the Criminal Procedure Code, (Cap. 6), have no application to a prosecution under section 35 of the Minor Offences Enactment. [273]

G. Terrell for the appellant.

I. W. Belloch (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Aitken J.: On the 7th of May, 1936, the appellant was convicted by the Magistrate, at Parit, of having in his possession at Teluk Bakong, on the 12th of March, 1936, 18½ gunny sacks of rubber lumps which might be reasonably suspected of being stolen or fraudulently obtained, and of failing to account satisfactorily how he came by the same. The charge was laid under section 35(i) of the Minor Offences Enactment, and on conviction the appellant was fined $10 with 10 days' rigorous imprisonment in default of payment, and the rubber was confiscated and ordered to be destroyed. From this conviction the appellant has appealed, and as his appeal raises several interesting points, it is necessary to set out the facts of the case so far as they were disclosed in the evidence led before the learned Magistrate, they lie within a narrow compass.

On the 12th of March, 1936, the appellant was acting as the "Chin Chew" or master of a motor launch named the *Seri Blanja,* which plies for hire between Lambor and Telok Anson. He had only assumed charge of the same two days previously, and was acting quite temporarily during the absence of the regular Chin Chew owing to illness. In point of fact the period during which he acted as Chin Chew or master of this launch only extended to one week, so that he seems to have been distinctly unfortunate in receiving a visit from the police on the 12th of March whilst the *Seri Blanja* was alongside the jetty at Telok Bakong. The police, who appear to have been acting "on information received," found 18½ bags of rubber lumps lying quite openly on the deck of the launch, but none of these bags bore any marks, or labels, or other indications, of ownership, and the appellant could produce no coupons, or export licence or other document of whatsoever nature relating to them. The accused was asked whence he got the rubber, and he gave the names of eight Malays living in or near Bota. At the request of the police he pointed out each of

these men to them, but none of the men so pointed out would admit any ownership or other interets in the rubber. The accused was then arrested on the same 12th of March, and the rubber also was taken into custody. Two days later — on the 14th of March — the accused made matters rather worse for himself by producing and handling to the police, chits purporting to have been given to him on the 12th of March by three licensed rubber dealers in the neighbourhood in relation to the transport to Telok Anson of the 18½ bags of rubber. On investigation each of those rubber dealers denied all knowledge of these chits, which were thus stigmatised as forgeries. In the face of this evidence, which was not contradicted by any evidence given by or on behalf of the accused, it is not altogether surprising to find that the accused was convicted and sentenced as above stated. Nevertheless, there is a good deal to be said for the appellant and Mr. Terrell urged me to set aside the conviction on the following grounds:—

1. Before a police officer can call upon any person under section 35(i) of the Minor Offences Enactment to say how he came by anything in his possession, circumstances must exist which give rise to a reasonable suspicion on his part that the same has been stolen or fraudulently obtained. No such circumstances did exist in this case, and there is no evidence to show that the police officer entertained any reasonable suspicion that the rubber had been stolen or fraudulently obtained at the time that he called upon the appellant to say how he came by it.

2. Assuming that the police were not exceeding their powers when they called upon the appellant to explain how he came by the rubber, nevertheless the explanation given by the appllant should not have been admitted in evidence against him in view of the provisions of section 113 of the Criminal Procedure Code. Had that explanation been excluded, as it should have been, then there would have been no evidence before the Court on which it could convict of an offence against section 35(i) of the Minor Offences Enactment.

As I feel no difficulty in rejecting the second of these two contetnions, I will deal with it first. It is true that section 113 of the Criminal Proceduce Code prevents any statement made by any person to a police officer in the course of a police investigation made under Chapter XIII of the Code from being used as evidence, save in circumstances which were certainly not present in this case but —

(a) there was no police investigation made in accordance with Chapter XIII of the Criminal Procedure Code in this case, and

[274] [274] (b) even if there was, the provisions of this section 113 are plainly at variance with the provisions of section 35(i) of the Minor Offences Enactment, and cannot be allowed to prevail over the latter for two reasons:—

(i) They would render the latter entirely inoperative since, if the accused person's explanation cannot be given in evidence against him, no offence under this sub-section could possibly be proved against anyone however suspicious might be the circumstances and unsatifactory the explanation.

(ii) The Minor Offences Enactment was enacted later than the Criminal Procedure Code, so that if there is any irreconcilable contradiction between their respective provisions, those of the later Enactment must prevail.

Turning now to the first of Mr. Terrell's contentions, it struck me at once as perfectly sound to argue that a police officer, acting under section 35(i) of the Minor Offences Enactment, must have a reasonable suspicion that the thing in possession or in course of conveyance has been stolen or fraudulently obtained at the time when he calls upon the possessor or conveyor to explain how he came by the same. Mr. Terrell, however, cited no authority in support of this contention, and I thought it of sufficient interest and importance to deserve some research on my part. The results of such research are as follows:—

Though I think I have traced section 35(i) of our Minor Offences Enactment to its source in section 24 of the Police Court (Metropolis) Act, 2 and 3 Victoria, c.71, yet I have been unable to find any decision on that section which throws any light on Mr. Terrell's contention, unless Blackburn J.'s remark in *Hadley* v. *Parks,* (14 L.T. 325), to the effect that this section 24 confers "a very extensive and arbitrary power," can be considered as in some degree helpful. I have, however, in *Howard* v. *Clarke,* 58 L.T. 401, discovered a helpful judgment on a somewhat analogous section of the Pawnbrokers Act of 1872 (35 and 36 Victoria, c.93). Thus, section 34 of that Act provides —

"In any case when, on an article being offered in pawn to a pawnbroker, he reasonably suspects that it has been stolen or otherwise illegally or clandestinely obtained, the pawnbroker may seize and detain the person and the article, or either of them, and shall deliver the person and the article, or either of them (as the case may be), as soon as may be into the custody of a constable....."

Acting under this section a pawnbroker named Clarke detained and delivered into the custody of a constable a Mr. Howard who had offered in pledge a gold horseshoe breast pin, set with seven diamonds, and a gold diamond ring. His reason for so doing was a notice from the local police, received rather less than a fortnight previously, warning him that in a recent burglary a "gold horseshoe pin, set with seven diamonds, massive," and a "gents's gold ring, set with three diamonds" had been stolen. It turned out, however, that the gold horseshoe breast pin and the gold ring offered in pledge belonged to a certain Mr. Noble, who had entrusted them to Howard for the purpose of pledging the same, and Howard was so incensed at Clarke's conduct that he brought an action in the County Court claiming damages for false imprisonment against him. He succeeded in the County Court, only to lose in the Queen's Bench Division on the ground that the pawnbroker's suspicion was reasonable. The following passage from the judgment of Smith J. appears to be in point here:—

"Now what is the evidence in this case? A felony had been committed, and a police notice sent out to various parties. The felony was committed on the 28th August, and on the 9th September the plaintiff went to the defendant's shop and offered a pin. I have no hesitation in saying that the pin certainly corresponded with the description in the notice. I have not the slightest doubt as to that. Now, it was the duty of the pawnbroker to act under such circumstances. He had notice that a pin had been stolen, and he came to the conclusion that the articles offered by the plaintiff were the stolen articles, and it seems to me he did what he was bound to do, namely, he detained the pin and the man. It has been said that he ought to have sent for Noble before giving the plaintiff into custody, but if he had done so it would have been evidence that he did not suspect that the pin had been stolen. The question is what the defendant really suspected at the moment. The moment for reasonable suspicion is the moment when the article is offered to the pawnbroker. The question is, aye or no, when the plaintiff went into the shop and offered the articles to the defendant,

had the defendant or had he not reasonable suspicion that the articles were stolen. It seems to me that he had, and therefore I think the learned Judge ought to have non-suited the plaintiff, instead of which he left the question to the jury."

[275] [275] If we apply this passage, *mutatis mutandis*, to the facts of the case now before me, it seems to me that we must agree with Mr. Terrell. In other words, this Court must be satisfied that the evidence shows that the police officer entertained a reasonable suspicion that the rubber in question had been stolen or fraudulently obtained at the time when he questioned the appellant. Unless I have overlooked some thing this passage from the judgment of Smith J. in *Howard* v. *Clarke, supra,* affords the only guidance to be obtained from the English authorities in regard to the interpretation of section 35(i) of our Minor Offences Enactment. It so happens, however, that there is a very similar section in the Criminal Code of the Gold Coast which reads as follows:—

"Whoever is brought before the Court charged with having in his possession or conveying in any manner anything which is reasonably suspected of having been stolen or unlawfully obtained and who does not give an account to the satisfaction of the Court as to how he came by the same shall be liable to imprisonment for three months."

This section of the Gold Coast Criminal Code came under the consideration of the local Supreme Court in the year 1931 in the case of *The Inspector-General of Police* v. *Dsane*. In that case, which was an appeal by way of case stated from a Magistrate's decision, the relevant facts may be stated very concisely thus. The police were prosecuting certain enquiries, and in the course of those enquiries a police constable had reason to seek for information from a certain Mr. Dsane. Whilst interrogating the latter the police constable noticed that he was wearing a half sovereign as an ornament, and half sovereigns being extremely rare in that country, he asked him how he came by it. Mr. Dsane gave an explanation which appears to have satisfied the constable, for nothing further was done about that half sovereign until three months later when, as a result of further information, Mr. Dsane was arrested and brought before the local Magistrate on a charge under this section. His explanation of how he came by the half sovereign failed to satisfy the Magistrate, and he was convicted and sentenced to two months' imprisonment with hard labour. On application the Magistrate stated a case for the consideration of the Supreme Court on the question. "Was there any evidence before the Court in proof of the fact that the property found in the possession of the accused was reasonably suspected of having been stolen or unlawfully obtained?" and in the course of his judgment allowing the appeal the learned Judge who heard it made the following observations:—

"It is important in the first place to consider at what stage this reasonable suspicion must exist. In my opinion the moment of such reasonable suspicion.....is the moment when the person is found in possession of the article by the person who subsequently prefers the charge against him. I shall now therefore consider the evidence before the Court..... The mere fact that it is stated in the charge that it was reasonably suspected that the half sovereign had been stolen or unlawfully obtained would not be sufficient to justify the Court in calling for an explanation from the accused, unless the Court was satisfied from the evidence before it that the constable arresting and charging the accused actually had such reasonable suspicion at the time when he found the accused in the possession of the half sovereign. In the absence of proof of such reasonable suspicion, in my opinion the Court below was not justified in calling upon the accused for an explanation. It is not therefore necessary for me to consider whether such explanation was satisfactory or not."

The decisions of the Supreme Court of the Gold Coast are, of course, by no means binding on the Supreme Court of the Federated Malay States; but I find myself entirely in agreement with those observations and have decided to adopt them as my own.

Having thus approved and supported by authority Mr. Terrell's contention, and thereby established that the police officer who first interrogated the appellant must be shown to have entertained a reasonable suspicion that the rubber in question had been stolen, or fraudulently obtained, at the time when he did so, the next step is obviously to consider the facts of this case and see whether there is any sufficient evidence to support that condition precedent. Fortunately there is no dispute as to the essential facts, and we may safely assume that on the 12th of March, 1936, Police Corporal Osman bin Omar, found the appellant in possession of a considerable quantity of rubber lumps enclosed in 18½ bags which bore no labels or other indications of ownership, and which were accompanied by no coupons or other documents issuable under the Rubber Regulation Enactment. Under such circumstances, and in view of the fact that these bags were being conveyed to Telok Anson, I think the police corporal might reasonably have suspected (a) that an offence against the Customs Laws was in contemplation, or (b) that an offence against the Rubber Regulation [276] Enactment or the Rules made there- [276] under was in course of commitment, or (c) that the rubber contained in those bags had been stolen or fraudulently obtained. What did the police corporal do? He asked the appellant where he got the rubber. That, to my mind, is a tolerably clear indication that he suspected a felonious or fraudulent origin of the appellant's possession: he might and probably would have asked quite a number of other questions had he harboured other suspicions. And this view of the state of mind of the police corporal is borne out by his subsequent conduct in taking immediate steps to test the veracity of the answer given to him by the appellant. It seems to be quite clear that he was not satisfied with that answer, and he lost no time in arresting the appellant as soon as his attempts to verify the same had ended in a complete failure. So also it seems to me that this appeal must fail, and for the reason that the evidence supports the view that on the 12th of March, 1936, the police corporal who questioned the appellant about the rubber then entertained a reasonable suspicion that the same had been stolen or fraudulently obtained. For the reasons which I have set out at length above this appeal must, in my opinion, be dismissed. I do, however, venture to add this rider: that where the evidence gives rise

to a strong *prima facie* case that an offence against one or more of the Federated Malay States Enactments has been committed, it is undesirable to make use of the somewhat "extensive and arbitrary" powers conferred on the police by this section 35(i) of our Minor Offences Enactment.

Appeal dismissed.

ITAM JAMALUDIN v. SAPIAH

[A.C.J. (Aitken J.) August 24, 1936]
[Perak Civil Appeal No. 13 of 1936]

Land Code (Cap. 138), s.107 — Scope and meaning of s.107.

The provisions of section 107 of the Land Code (Cap. 138) do not allow an unregistered and unregistrable memorandum of transfer to be treated as effectual to deprive a registered proprietor of his indefeasible title. They are only intended to provide a simple procedure for rectifying errors on the face of the register which have arisen owing to —

(a) fraud or misrepresentation on the part of the registered proprietor, chargee or lessee, or

(b) registration of a forged instrument, or of an insufficient or void instrument, or

(c) the defeat of a proprietor's title by operation of law, or

(d) some mistake upon the part of the proper registering authority.

APPEAL from Collector of Land Revenue.

M. S. Mahendran for the objector-appellant.

Applicant-respondent in person.

Cur. Adv. Vult.

Aitken J.: The facts out of which this appeal arises are simple and not in dispute. The applicant-respondent is the widow of one Din bin Aripen, late of Tapah, who died on the 1st of November, 1935, and the objector-appellant is a brother of the deceased. On the 19th of August, 1935, the late Din bin Aripen and the applicant appeared before the Assistant Collector of Land Revenue, Batang Padang, and duly executed a memorandum of transfer in the statutory form which, omitting the purely formal parts, reads as follows:—

"I, Din bin Aripen, of Tapah being registered as the proprietor subject to the leases charges or other registered interests stated in the document of title thereto of the whole interest of the land held under Entry in the Mukim Register No. 1817 for Lot No. 1900 in the Mukim of Batang Padang in the district of Batang Padang in area 4 acres in consideration of the sum of dollars five hundred only ($500) paid to me by Sapiah binti Dera as trustee of Ramlah binti Din of Tapah the receipt of which sum I do hereby acknowledge do hereby transfer to the said Sapiah binti Dera as trustee of Ramlah binti Din of Tapah all my right title and interest in the said land."

It seems to be clear that the late Din bin Aripen was desirous of providing for his daughter (or adopted daughter) Ramlah binti Din, who was then a child of 14 years of age, and executed this transfer with that object in view: the real consideration was not $500 but natural love and affection. On the same date, but later in point of time, the applicant executed another document before the same Assistant Collector of Land Revenue whereby she declared that she held the land so transferred to her in trust for Ramlah binti Din and would transfer it to the latter when she attained her majority. One of the two persons who identified the late Din bin Aripen and the applicant to the Assistant Collector of Land Revenue at the time of the execution of this transfer is a certain Jamaludin bin Tapah, and after the execution of this transfer and declaration of trust the applicant handed both documents over to him and $16 in cash, with a request that he would have them both properly stamped and the first duly registered and the second duly deposited. She was probably constrained to entrust those very important matters to Jamaludin because the late Din bin Aripen was very ill at the time and required her [277] attention. Most unfortunately Jamaludin proved to be entirely untrustworthy, and when Din bin Aripen died on the 1st of November, 1935, it was discovered that the memorandum of transfer had not been registered. Although this memorandum of transfer was otherwise perfectly fit for registration, the transferor's death prior to presentation rendered such registration impossible in view of the provisions of section 85(ii) of the Land Code. In these circumstances the applicant applied to the Collector of Land Revenue, Batang Padang, to be registered as the proprietor of the land held under Entry in the Mukim Register No. 1817 for Lot No. 1900 in the Mukim of Batang Padang in trust for the child Ramlah binti Din. Her application duly came on for hearing before the Collector on the 1st of May, 1936, in the presence of the objector who gave notice of his objection at the very commencement of the proceedings, and after one somewhat length adjournment to enable the applicant to call as a witness Jamaludin bin Duaris, the man whose misconduct has caused all this trouble, the Collector gave his decision on the 5th of June, 1936, in favour of the applicant. From this decision the objector has appealed to me in accordance with the terms of section 170(xii) of the Land Code. [277]

In his grounds of judgment, after remarking that the objector had not challenged in any way the execution of the transfer and declaration of trust of the 19th of August, 1935, the Collector continued as follows:—

"The objector, Itam Jamaludin bin Ariffin in his statement states nothing more than he is a brother of the deceased and therefore according to Mohammadan Law (Hukom Shara'yah) he is entitled to a share in any property left by the deceased: deceased died without leaving any beneficiary by whom his claim is debarred. But since the land, the only property of the deceased, was already transferred I take it that the deceased had in effect, no property left by him. And because the deceased left no property so Itam Jamaludin bin Ariffin has nothing to claim.

It may also be noted that the deceased left a sister and three other brothers now living beside the objector, but none of them came forward to object this claim.

Taking that the transfer was in effect valid, I therefore ordered that the land held under E.M.R. 1817 Mukim of Batang Padang be registered in the name of Sapiah binti Dera as trustee of Ramlah binti Din."

It is thus apparent that the Collector's decision is based on his view that the transfer of the 19th of August, 1935, is "in effect valid."

Now my sympathy in this unfortunate affair is entirely and sincerely with the applicant and her daughter Ramlah binti Din, and I have tried hard to discover some ground on which I could dismiss this appeal. But a prolonged and careful study of the